IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

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| FLIR Systems, Inc. an Oregon Corporation, Plaintiff, v. Sierra Media, Inc, a Washington Corporation; Fluke Corporation, a Washington Corporation, Defendants. | No. CV-10-971-HU<br><br>OPINION AND ORDER |

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HUBEL; Magistrate Judge,

Plaintiff FLIR Systems, Inc. brought claims against Defendant Fluke Corp. and its media consultant, defendant Sierra Media, Inc. for (1) false advertising under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), (2) trade libel/commercial disparagement, (3) intentional interference with prospective economic relations, (4) civil conspiracy, (5) aiding and assisting, and (6) for declaratory relief concerning an alleged trademark. Before the court are defendants' motions to dismiss claims two, three, four, and five. For the reasons set forth below, defendants motions are granted, in part, and denied, in part.

**Facts**

Plaintiff FLIR Systems, Inc. is a business that designs, manufactures, and markets thermal imaging cameras. Defendant Fluke Corp. is a competitor of FLIR that manufactures and distributes electronic test tools as well as thermal imaging cameras. According to FLIR, Defendant Sierra Media, Inc. has had a business relationship with Fluke for 15 years, and serves as Fluke's media and marketing company. First Am. Compl. ¶ 10.

The present conflict between the parties stems from a video that Fluke and Sierra created together.

In September 2009, Fluke and Sierra worked together to create a video ("the Video") that compared "drop test" results of thermal imaging equipment manufactured by Fluke to four competing products, three of which were manufactured by FLIR. The video shows products from the two companies dropping two meters onto a concrete floor. In the video, the Fluke equipment bounces, but appears to remain intact. The other products appear to either break or have battery covers come off and batteries eject, or both. There are no spoken words in the video, although periodically text appears embedded in the video. In order, the text reads: "Fluke thermal imagers. Rugged. 5 thermal imagers. 2 meter drop. Solid concrete floor. All products subjected to identical tests by third party. Fluke Ti32-17 drops and counting... The ONLY rugged thermal imager. Why waste money on tools that break? Get a demo today. 1-800-760-4523. www.fluke.com/demo." The video is found on YouTube at http://www.youtube.com/watch?v=bFFpWq9h5Ls.

Immediately below the Video, on YouTube, the words, "View our Test Methodology here: http://bit.ly/cxlvBB - Fluke Thermography contracted a 3rd party to perform and film this drop test video." The Test Methodology link leads to a PDF of document titled Thermal Imager Drop Test Video Methodology, which is printed on letterhead reading "sierra media digital media production and post," and is dated January 20, 2010. It reads, in part,

///

> Sierra Media was contracted under Fluke Corporation to perform and film an independent, third party drop test, and warrants that the following test was executed under controlled conditions:
>
> Products tested:
>
> - Flir I-7 Thermal Imager, Flir I-60 Thermal Imager, Flir T-400 Thermal Imager, Fluke Ti32 Thermal Imager, Testo 880-3 Thermal Imager.
>
> - All imagers were new or like-new, with no prior usage in commercial or industrial environments. Certifications and serial numbers are on file.
>
> . . . .
>
> Methodology:
>
> - All thermal imager drops occurred during a 12 hour period in the same location under a controlled environment
>
> - All imagers were dropped multiple times from a height of 2 meters off a drop mechanism to the same location on a solid concrete floor
>
> - All imagers were placed on the drop mechanism as consistently as their form factor allowed (T-400 and I-60 were placed on their bottoms and the I-7, Ti32 and Testo 880-1 on their sides)
>
> Daniel A. Cardenas
> Producer/Director

Daniel Cardenas is a director at Sierra.

According to FLIR, "In the Video, Fluke and Sierra represent to FLIR and Fluke customers and potential customers that independently designed, conducted, and filmed tests were conducted by Sierra. Sierra knew the representation was false-Fluke controlled the design of the test and participated in the editing of the Video." First. Am. Compl. ¶ 13. FLIR alleges that Sierra allowed Fluke to create and revise the testing methodology and put it on Sierra's letterhead, while representing that Sierra was an "independent, third party." Id. FLIR further

alleges that Sierra's founder, Daniel Cardenas, was aware of this when he signed a methodology document and permitted it to be published together with the Video.

In general, FLIR alleges that Fluke and Sierra selectively edited the video to make it seem like Fluke cameras survive falls to the floor, and competing products like FLIR's always break.

FLIR alleges it lost prospective clients because of the video. Specifically, FLIR alleges,

> [I]n August 2010, FLIR lost a sale to a Fortune 100 company as a direct result of the video. Specifically, an employee at this Fortune 100 company was required by his superior to purchase the Fluke Camera rather than one of the FLIR Cameras because, after watching the Video, the employee's boss stated that FLIR's cameras are 'way too sensitive if they get dropped.' In addition, two other potential customers–a building inspection company and a heating and air conditioning company–have indicated that because of the Video they may purchase a Fluke Camera rather than a FLIR Camera[.]

First Am. Compl. ¶ 40.

**Standard**

A motion to dismiss under Rule 12(b)(6) will be granted if plaintiff fails to allege the "grounds" of his "entitlement to relief." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007) (quotation omitted) (abrogating Conley v. Gibson, 355 U.S. 41, 45-46 (1957) and its test that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim"). The plaintiff must plead affirmative factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, -- U.S. --, 129 S. Ct.

1937, 1949 (2009). The affirmative factual content requirement demands "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. United States Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) citing Iqbal, 129 S. Ct. at 1949.

**Discussion**

Both Fluke and Sierra move to dismiss the claims for trade libel, intentional interference, and civil conspiracy. Sierra alone moves to dismiss the aiding and assisting claim.

Before delving into the claims at issue, however, it is necessary to explain that the court, in evaluating the motions to dismiss, considered, for context, the Video at issue and the methodology document that accompanied it under the "incorporation by reference" rule. "In doing so, [the court] deviate[d] from the general rule that courts, when ruling on a motion to dismiss, must disregard facts that are not alleged on the face of the complaint or contained in documents attached to the complaint. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). This approach is permissible under the "incorporation by reference" doctrine, which permits the court to take into account documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." Id.

The video and the methodology document are found at

http://www.youtube.com/watch?v=bFFpWq9h5Ls and http://bit.ly/cxlvBB, respectively.

I. Count Two: Trade Libel/Commercial Disparagement

This court has previously held, "To prevail on its state law trade libel claim, plaintiff must prove that defendant published false allegations regarding [the plaintiff] with malice, and that plaintiff has, as a result, suffered special damages or pecuniary harm." Soloflex, Inc. v. NordicTrack, Inc., No. CV 93-545-JE, 1994 WL 568401, at *13 (D. Or. Feb. 11, 1994) (citing Woodard v. Pacific Fruit & Produce Co., 165 Or. 250, 106 P.2d 1043, 1045 (1940)). Thus, to state a claim for trade libel, the plaintiff must allege that the defendant (1) published (2) one or more false allegations (3) pertaining to plaintiff, (4) with malice, and (5) as a result, (6) the plaintiff suffered damages. False allegations means "false . . . statements." Woodard, 165 Or. at 255.

FLIR argues that Fluke and Sierra published at least two false statements. First, FLIR alleged in the Complaint the falsity of the statement that Sierra conducted an "independent, third party drop test." Second, FLIR alleges that the statement, "Fluke Ti32-17 drops and counting... The ONLY rugged thermal imager," displayed after the video shows the FLIR cameras breaking and the Fluke camera bouncing, states falsely that FLIR cameras break immediately when dropped, but Fluke cameras can be dropped over and over without breaking. Fluke and Sierra argue that FLIR alleges only omissions of facts they wish had been included, such as how many times the FLIR cameras were actually dropped before they broke. Fluke and Sierra contend that

omissions are not actionable.

An Oregon district court case Soloflex, Inc. v. NordicTrack, Inc., No. CV 93-545-JE, 1994 WL 568401, at *13 (D. Or. Feb. 11, 1994), illustrates the contours of what must be alleged to state a claim for trade libel.

In Soloflex, Inc., the plaintiff, a maker of home exercise equipment, sued defendant NordicTrack, Inc., a competitor, alleging that defendant's infomercials were too similar to plaintiff's infomercials. 1994 WL 568401, at *1. One of the six claims against defendant was for common law trade libel. Id.. The defendant moved for summary judgment against plaintiff's six claims, and Judge Jelderks denied summary judgment on, among others, the trade libel claim. Judge Jelderks discussed the trade libel claim:

> To prevail on its state law trade libel claim, plaintiff must prove that defendant published false allegations regarding Soloflex with malice, and that plaintiff has, as a result, suffered special damages or pecuniary harm. Woodard v. Pacific Fruit & Produce Co., 165 Or. 250, 106 P.2d 1043, 1045 (1940). Defendant argues only that plaintiff cannot meet this burden because defendant has demonstrated the "truth" of each and every advertising claim made by NordicTrack and that every claim is backed up by substantial, credible research.
>
> Because I have found that questions of fact exist as to whether defendant's advertising claims are false, summary judgment cannot be granted on plaintiff's trade libel claim. This court cannot rule as a matter of law that defendant did not publish with malice or that plaintiff has not suffered special damages or pecuniary harm due to defendant's allegedly false advertising. I therefore deny defendant's motion for summary judgment on this claim.

Id. at *13-14. The claims under the Lanham Act and for trade libel related to allegedly "false visual and textual representations regarding the natural strength curve, and the

resistance curves of NordicFlex and Soloflex in relation to the natural strength curve." Id. at *3-5. On defendant's motion for summary judgment on the claims, defendant argued that plaintiff could not prove the falsity of the claims and could not prove that the statements were material and deceiving. Id. at *5. The court simply concluded, "At issue are an array of expert opinions offered by both sides. Those opinions offer experienced and credible expertise regarding the exercise issues raised by plaintiff in its false advertising claim. There are clearly many disputed issues of material fact that prevent the entry of summary judgment on this claim." Id. at *6.

Soloflex demonstrates that a trade libel claim can be based on words, pictorial depictions, or some combination of the two. Judge Jelderks denied summary judgment on a trade libel claim that involved false visual and textual representations of a strength curve, because he found that there were disputed issues of fact about whether it was false. Oregon case law, therefore, leaves open the possibility of a trade libel claim where part of the statement is made through a video representation.

Defendants cite two cases, Auvil v. CBS 60 Minutes, 67 F.3d 816, 822 (9th Cir. 1995) and Pond v. Gen. Elec. Co., 256 F.2d 824, 828 (9th Cir. 1958), for the proposition that an omission cannot serve as the basis for a trade libel claim. I agree with defendants' premise that a bare omission cannot typically serve as the basis for a trade libel claim, but reject their argument at this early stage of this case. Construed liberally, the language of FLIR's complaint alleges affirmative false statements made by the video and the methodology document, not just

omissions.

The First Amended Complaint states that defendants contrived "a commercial advertising campaign that falsely purports to 'compare' thermal imaging equipment manufactured by Fluke to thermal imaging equipment manufactured by FLIR." First. Am. Compl. ¶ 12. Elsewhere, the First Amended Complaint alleges "defendants made false and disparaging representations about FLIR and FLIR's products." Id. at ¶ 59. Plaintiff continued, "Defendants published . . . false and deceptive statements and representations concerning Fluke and FLIR's products, including the false representation that, when dropped from a height of 2 meters onto a concrete floor, the FLIR Cameras broke apart upon initial impact, whereas the Fluke camera remained intact and operable." Id. at ¶ 60.[1] In addition, FLIR alleged, "Defendants represent that "an independent 3rd party performed and filmed this drop test," but "that representation was false" because "Sierra is Fluke's longtime advertising company[.]" Id. at ¶¶ 20, 21. FLIR alleged that an email from Fluke's marketing manager stated the "Intent is to create the atmosphere of an independent testing lab" and "to load these Videos to YouTube so it looks like its coming from a user or independent source." Id. at ¶ 25. Addressing its damages, FLIR alleged that it lost a sale to a Fortune 100 company. Id. at ¶ 40.

The above allegations are sufficient allegations of trade

[1] At oral argument counsel for Fluke stated that in at least some of the video of FLIR imagers, the footage showing some damage occurring was not on the first drop, but after multiple drops.

libel under Iqbal and Twombly's requirements. Accordingly, Fluke and Sierra's motion is denied with respect to the trade libel claim.

II. Count Three: Intentional Interference with Prospective Economic Relations

"To state a claim for intentional interference with economic relations, a plaintiff must allege each of the following elements: (1) the existence of a professional or business relationship (which could include, e.g., a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages." McGanty v. Staudenraus, 321 Or. 532, 536, 901 P.2d 841, 844 (1995).[2]

Fluke argues that FLIR's First Amended Complaint fails to adequately state a claim for intentional interference because it does not allege that a relationship existed between FLIR and the unnamed potential customers in paragraph 40 of the First Amended Complaint, and because it does not allege that Fluke knew about the alleged relationship. FLIR responds that an actual relationship between it and the potential customer is not necessary, and that a prospective relationship, or expectancy of a relationship are all that are needed to state a claim.

FLIR cites Allen v. Hall, 328 Or. 276, 974 P.2d 199 (1999)

[2] The first element has also been stated as " the existence of a valid business relationship or expectancy." Uptown Heights Associates Ltd. Partnership v. Seafirst Corp., 320 Or. 638, 651, 891 P.2d 639, 646 (1995).

in support of its contention that a valid business relationship need not exist at the time of the interference by a third party. In Allen, relatives of a decedent brought an action in federal court against will beneficiaries alleging intentional interference with prospective inheritance. Id. The facts of the case involved an elderly gentleman (the decedent) who required in-home care and who wrote a first will leaving all his possessions to his defendant caretakers, and nothing to the plaintiffs. Id. at 279. Just days after executing his first will, he wrote a draft of a second will that left possessions to the plaintiffs. Id. The decedent, gravely ill, met with his attorney and instructed him to change the will to leave possessions to the plaintiffs. Id. When the second version of the will was ready to be executed, the defendants prevented it from happening by checking the decedent into the hospital, falsely telling the attorney that decedent was not lucid to sign a will, falsely claiming to have power of attorney over the decedent, and otherwise obstructing the decedent from signing the second will. Id. Decedent died within days, and the plaintiffs sued the defendants for intentional interference with prospective inheritance. Id. The Ninth Circuit eventually certified two questions to the Oregon Supreme Court: "(1) Does Oregon recognize the tort of intentional interference with prospective inheritance? (2) If a tort action for intentional interference with prospective inheritance is available, what are the elements of that tort?" Id. at 278. The Oregon Supreme Court reformulated the question as, "Have plaintiffs in this case, who have brought a tort action based on a theory that defendants

wrongfully interfered with a prospective inheritance that otherwise would have gone to plaintiffs, alleged facts which, if proved, would form a basis for relief under Oregon law?" Id. The court held that the answer was "Yes." Id. It began by explaining

> Under Oregon law, an intentional interference with a prospective inheritance may be actionable under a reasonable extension of the well-established tort known as intentional interference with economic relations. Although, heretofore, this court has applied that tort only to contractual and business relationships and prospects, we are persuaded that the tort also may, by a reasonable and principled extension, be made applicable to some noncommercial relationships and prospects, such as the one alleged by plaintiffs in the present case.

Id. at 281. The court based its reasoning on "the very close analogy that exists between an expectancy of inheritance and those other interests to which this court already has extended the protections of the tort of intentional interference with prospective economic advantage." Id. The court did not, however, delve into the type of relationship required to fulfill the first element of a claim for intentional interference with a prospective business relationship. The entirety of its discussion on this point reads, "plaintiffs have alleged facts that satisfy the first element of the tort, viz., the existence of a prospective economic advantage in the form of a prospective inheritance." Id. at 285.

Allen does not, however, extend the first element of a claim for intentional interference to a relationship that might happen with just anyone. Rather, Allen concerns a testator who wished to leave assets to specific plaintiffs, directed a draft document to be prepared indicating as much, met with his attorney and

instructed him to carry out his wishes, and then was blocked from completing his wishes by a third party. These facts show parties who evidenced an intent to enter into a specific testator-beneficiary relationship, but were blocked from doing so by a third party. I find another case more helpful in understanding the required nature of the relationship which will support this claim.

In Oregon Life and Health Ins. Guar. Ass'n v. Inter-Regional Financial Group, Inc., 156 Or. App. 485, 498, 967 P.2d 880, 887 (1998), the Oregon Court of Appeals explained the relationship element:

> To proceed on its . . . claim, plaintiff must establish first that there was a contractual or business relationship between plaintiff and a third party in which defendant interfered. See McGanty v. Staudenraus, 321 Or. 532, 535, 901 P.2d 841 (1995) (listing that factor as one of five elements); see also Uptown Heights Associates Ltd. Partnership v. Seafirst Corp., 320 Or. 638, 651, 891 P.2d 639 (1995) (same). In other words, *the tort does not protect the business expectations of a single entity; it protects the contractual or business relationship between a plaintiff and a third party*. See McGanty,321 Or. at 536, 901 P.2d 841 (stating that the "tort serves as a means of protecting contracting parties against interference in their contracts from *outside* parties" (emphasis in original)); see also Lewis v. Oregon Beauty Supply Co., 302 Or. 616, 622, 733 P.2d 430 (1987) (holding that the "salient inquiry in any interference claim is whether defendant's tortious conduct damaged plaintiff's economic or contractual relationship," which could occur by "defendant's interference causing a third person *to discontinue* the relationship with plaintiff."

(emphasis added).

The intent of this tort, therefore, is to protect both parties to a prospective business relationship from a third party who would interfere. This is different from inducing a potential customer who has had no contact with the plaintiff, whether initiated by the customer or the plaintiff, to purchase a

competing product rather than plaintiff's product. Moreover, the Court of Appeals' use of the word "discontinue" indicates that some kind of relationship must exist prior to the action that allegedly interferes and causes a third person to discontinue that relationship. FLIR's comments at oral argument seem to suggest it is such a large player in the thermal imager market that anyone who buys one from any supplier, whether or not the buyer ever had contact with FLIR, is someone with a sufficient relationship with FLIR to support this tort. That is not the law in Oregon.

The First Amended Complaint states that "FLIR had prospective economic relationships with various potential customers, including a Fortune 100 company, a building inspection company, a heating and air conditioning company, and others." First. Am. Compl. ¶ 74. It specifies,

> In August 2010, FLIR lost a sale to a Fortune 100 company as a direct result of the Video. Specifically, an employee at this Fortune 100 company was required by his superior to purchase the Fluke Camera rather than one of the FLIR Cameras because, after watching the Video, the employee's boss stated that FLIR's Cameras are "way too sensitive if they get dropped." In addition, two other potential customers–a building inspection company and a heating company and a heating and air conditioning company–have indicated that because of the Video they may purchase a Fluke Camera rather than a FLIR Camera: "the 'Drop Test' has got me sold on Fluke unless you can convince me otherwise" and "we did meet with Robert Levy of Fluke (RJM Sales) last night. We looked at the TIR unit, and were impressed by its ruggedness and large screen. He showed us a video of drop tests of the FLIR and Fluke products, where the Fluke bounced and the FLIR's broke . . . very impressive."

Id. at ¶ 40.

These allegations, however, lack a statement specifying that FLIR and the unnamed prospective customers or others had any sort

of business relationship prior to the customer seeing the Video. The absence of such a statement is fatal to this claim.

Fluke argues that even if such a relationship did exist, the absence of an allegation that Fluke knew about it and intentionally interfered is also fatal to the claim. The Oregon Court of Appeals has explained that a defendant "must have known of the plaintiff's prospective relationship and intentionally interfered with that relationship." United Employer Ben. Corp. v. Department of Ins. and Finance of State of Or., 133 Or. App. 477, 487, 892 P.2d 722, 728 (1995). FLIR argues that it was not necessary to plead Fluke's knowledge specifically because it was obvious that "Fluke knew that every potential customer for thermal imaging cameras is a prospective customer for FLIR." Pl.'s Response Def.'s Mot. Dismiss at 19. Again, I disagree.

The mere possibility that a person or business might buy a product from FLIR in the future is not enough, alone, to create a business relationship for the tort at issue, nor to establish the defendants' knowledge of and intent to interfere with the relationship. Accordingly, defendants motion to dismiss FLIR's claim for intentional interference with a business relationship is granted.

III. Count Four: Civil Conspiracy

A civil conspiracy is two or more persons' concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. Osborne v. Fadden, 225 Or. App. 431, 437, 201 P.3d 278, 282 (2009). "It is not a separate tort or basis for recovery but, rather, a theory of mutual agency under which a conspirator becomes jointly liable

for the tortious conduct of his or her coconspirators." Id. "To establish a civil conspiracy, petitioners must establish (1) Two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." Id. "The primary purpose of a conspiracy must be to cause injury to another." Bonds v. Landers, 279 Or. 169, 175, 566 P.2d 513, 516 (1977). Where a civil conspiracy claim is based on alleged misrepresentation, the elements must be plead with particularity pursuant to FRCP 9(b). See Wasco Prods., Inc. v. Southwall Techs., Inc., 435 F.3d 989, 990 (9th Cir. 2006).

Fluke and Sierra argue the civil conspiracy claim must be dismissed because FLIR has not adequately plead a "meeting of the minds" or that the primary purpose of the alleged conspiracy was to harm FLIR.

FLIR responds that the facts set forth in the complaint are sufficient to infer a meeting of the minds. FLIR points to its allegations that (1) Sierra was retained and paid by Fluke to assist in the design, creation, and publishing of the Video, First Am. Compl. ¶¶ 10, 85; (2) Sierra had served as Fluke's media and marketing company for 15 years, First Am. Compl. ¶ 10; (3) Fluke and Sierra acted as a "team" during production of the Video, First Am. Compl. ¶¶ 15, 30; (4) Sierra knew that the depiction of the FLIR and Fluke cameras in the video did not accurately reflect durability, and yet published the video anyway, and (5) as a result of publishing the Video, FLIR lost sales. First Am. Compl. ¶¶ 15, 18, 19, 30, 39, 40, 60, 61. FLIR argues that, taken together, these allegations are sufficient to

alleged the elements of civil conspiracy and to show that Fluke and Sierra had a meeting of the minds that the purpose of the Video was, in part, to disparage FLIR's cameras.

Fluke and Sierra respond that the meeting of the minds requirement pertains to agreement to accomplish the unlawful acts–in this case, intentionally interfering with FLIR's economic relationships or making a knowingly false statement about FLIR in the drop test video. They argue that an agreement to make a promotional video that has the purpose of giving Fluke a competitive advantage in the marketplace is different than a conspiracy to make false statements about FLIR.

I have dismissed the intentional interference claim. The underlying issue here is whether the allegation that Fluke and Sierra's had knowledge that the video results pertaining to FLIR's products were false, is sufficient to state a claim that Fluke and Sierra conspired to commit trade libel. I am persuaded that, at this stage of the proceedings, such allegations are sufficient. I have held, above, that FLIR's trade libel claim survives because the allegations of the complaint are sufficient state a claim that the words and depictions in the video, together with the methodology document, could be construed to make a knowingly false statement about FLIR's products. This being the case, there is little doubt that FLIR's allegations sufficiently state that FLIR and Sierra consciously worked together to achieve the joint purpose of promoting Fluke's products while simultaneously making a false statement about FLIR's products. Accordingly, the motion to dismiss FLIR's claim for civil conspiracy is denied.

IV. Count Five: Aiding and Assisting

FLIR's claim for aiding and assisting, which is directed at defendant Sierra only, is sufficient for the reasons stated above with regard to its claim for civil conspiracy.

Accordingly, Sierra's motion to dismiss FLIR's claim for aiding and assisting is denied.

**CONCLUSION**

Defendant Fluke's and defendant Sierra's motions to dismiss [doc. # 40, 42] are granted, in part, and denied, in part.

IT IS SO ORDERED.

Dated this 10th day of May, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge